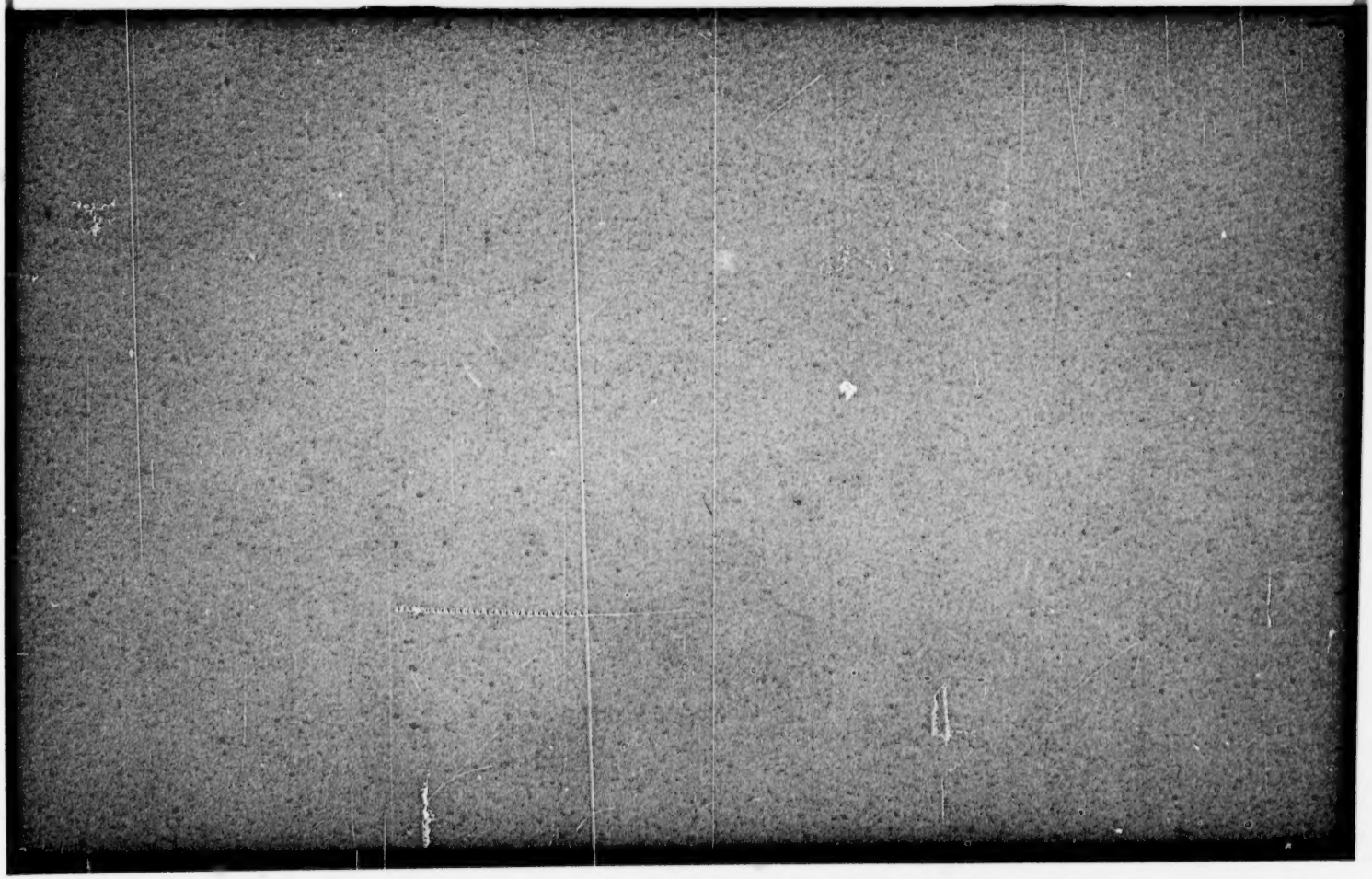

SUPREME COURT, U. S.
FILED
JUN 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1712

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

vs.

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION, RESPONDENT, IN OPPOSITION

HERBERT PRASHKER
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
Attorneys for
Sperry Management Division,
Sperry Rand Corporation, Respondent
777 Third Avenue
New York, New York 10017
(212) 688-3200

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Other Statutory Provisions Involved	2
Questions Presented	3
Statement of the Case	7
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 10, 12

Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203 (1964) 9

International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731 (1961) 4

Local 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283 (1959) 9

National Woodwork Manufacturer's Assoc. v. NLRB, 386 U.S. 612 (1967) 9

PAGE

Sperry Division of Sperry Rand Corporation v. Local 445, I.U.E.R.M.W., AFL-CIO, 80 LRRM 2061 (Sup. Ct. N.Y.Co., 1971) 4

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 8

Statutes:

28 U.S.C. 1254(1) 2

National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 4, 9, 12

Section 8(a)(2), 29 U.S.C. 158(a)(2) 2

Section 8(b)(3), 29 U.S.C. 158(b)(3) 9, 12

Section 8(b)(4), 29 U.S.C. 158(b)(4) 12

Section 10(f), 29 U.S.C. 160(f) 2

New York Civil Practice Law and Rules, Section 7511(a) 5

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1712

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

vs.

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION, RESPONDENT, IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (Pet. App. A1-A14) is reported at 492 F.2d 63. The decision and order of the Board (Pet. App. C1-C14) are reported at 202 NLRB No. 18.

Jurisdiction

The judgment of the Court of Appeals (Pet. App. B1-B2) was entered on February 15, 1974. The Petition for a writ of certiorari was filed on May 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Other Statutory Provisions Involved

In addition to the provisions of the National Labor Relations Act as amended (the "Act"), 29 U.S.C. 151 *et seq.*, set out in Appendix K to the Petition, this case also involves Sections 8(a)(1) and (2) and 10(f) of the Act, 29 U.S.C. 158(a)(1) and (2) and 160(f). They provide in pertinent part as follows:

> "Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:
>
> * * *
>
> Sec. 10.(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in * * * by filing in such a court a written petition praying that the order of the Board be modified or set aside * * * Upon the filing of such

petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section * * * the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall * * * be conclusive."

Questions Presented

1. Whether the Court of Appeals misapplied Section 10(f) of the Act in holding that "the Board's finding that the Union's efforts [to enforce an arbitration award directing the Company to apply the substantive terms of its collective agreement covering a unit of the Company's Long Island, New York employees to Company employees in Vallejo, California] were motivated by a desire to protect the job security of the Long Island employees and not by a desire to represent the Vallejo employees was not supported by substantial evidence" (492 F.2d at 68; Pet. App. A9).

2. Assuming that the Court of Appeals erred on Question "1" above, whether the Court of Appeals erred in holding that regardless of the Union's motivation, the Union's efforts to require the Company to apply the substantive terms of its collective bargaining agreement covering the New York unit to its California employees were a refusal to bargain in respect of the New York unit under Section 8(b)(3), when the Board had found the California employees to belong to a separate appropriate bargaining unit, the members of the California unit had voted against representation by the Union in an NLRB election, and

"there is no evidence that the terms of employment at the Vallejo unit affected the New York unit" (492 F.2d at 70; Pet. App. A14).

Statement of the Case

On April 19, 1971 an Arbitrator, authorized to determine whether certain California employees of the Company were "under the coverage" (E107) of a collective agreement covering a certified unit of the Company's New York employees, held (a) that the New York contract did not cover the California employees because it could not lawfully do so under the Act, but (b) directed, nevertheless, that the substantive provisions of the contract, not including the "Union Shop and other representation clauses", should be applied to those California employees (E127).* On May 10, 1971 the Union petitioned the Board to represent a unit including the California employees who had been the subject of the award (E133). On June 10 the Board

* Subsequent to the Union actions to enforce the award which gave rise to the NLRB proceeding now before this Court, the New York courts vacated the award upon two grounds: (1) that the award had gone beyond the issue submitted to the Arbitrator; and (2) that the award would have required the Company to violate §8(a)(1) of the Act under *International Ladies' Garment Workers' Union, AFL-CIO* v. *NLRB*, 366 U.S. 731 (1961), by requiring the Company to impose union-negotiated contract terms upon employees who had voted against union representation. *Sperry Division of Sperry Rand Corp.* v. *Local 445, I.U.E.R.M.W., AFL-CIO*, 80 LRRM 2061 (Sup. Ct. N.Y.Co., 1971), *affirmed*, 42 App. Div. 2d 691, 345 N.Y.S.2d 972 (1st Dept. 1973), *leave to appeal denied*, 33 N.Y. 2d 517 (1973). The Court of Appeals' decision also declared the award to be "repugnant to the Act" (492 F.2d at 70, n.8; Pet. App. A14), on the ground that "the Company could not have complied with * * * [it] without infringing upon the rights of the Vallejo employees in violation of §§8(a)(1) and (a)(2) of the Act" (492 F.2d at 70; Pet. App. A14).

determined a California unit to be appropriate for bargaining, and directed an election among the employees in that unit (E138-E139). On July 20, the last day under New York law for the Company to commence a proceeding to modify or set aside the award, New York Civil Practice Law and Rules §7511(a), the Company commenced a proceeding to delete the award's direction to apply the substantive terms of the contract to the California employees on the stated ground that the award was, to that extent, upon an issue not submitted to the Arbitrator (E163-E164).

On July 26 the Union filed a new grievance under the New York contract demanding that the Company comply with the award by, among other things, recalling the California employees whom the Company had laid off prior to the award for lack of work, and making them whole (E145). On August 5 the California employees voted against Union representation in the NLRB election (E218). On August 11 the Union pressed its grievance on behalf of the California employees, including its demand for recall of the laid-off employees, at a meeting with the Company in the New York plant (E228-E229). The Company then filed the refusal-to-bargain charge against the Union which has now reached this Court, alleging that the Union's attempts to require the Company to apply the substantive terms of the New York contract to California employees it did not represent, by using the grievance procedure of that contract, was a refusal to bargain in respect of the New York unit (E7).

On August 27, 1971 the Union referred its grievance filed July 26, 1971 to arbitration under the New York con-

tract (E149) and on September 9, 1971, it requested the designated arbitrator to arrange for arbitration (E153).

On December 27, 1971 the Board's General Counsel issued a complaint based on the Company's refusal to bargain charge (E11). There was a hearing on that complaint before a Board Trial Examiner (now called "Administrative Law Judge") on March 6, 1972.

On July 12, 1972 the Administrative Law Judge ("ALJ") issued his decision (Pet. App. D1-D23), finding that the Union's efforts to enforce the award "were motivated by a desire to preserve job opportunities for the Great Neck drafting employees" (Pet. App. D20) and that by its demand for the recall of the two laid-off employees, "[p]robably . . . [the Union] expected to win over the employees' support in the forthcoming election" (Pet. App. D21). On that basis, the ALJ recommended dismissal of the complaint (Pet. App. D23).

The Company filed exceptions to the ALJ's decision (A26a-30a), including a specific exception to the finding that the Union's recall demand could be understood as a bid for support in the "forthcoming" Board election, since the Union had repeated and pressed this demand after the election had already been lost (A26a-30a).

On September 11, 1972 the full five-man Board heard oral argument and on March 5, 1973, by a 3 to 2 majority, issued its decision and order finding no violation as alleged and dismissing the complaint (Pet. App. C1-C13). Referring to the issue raised by the Company's exception concerning the Union's recall demands, the Board majority

stated that they "may well appear at first glance at least to have representational overtones" (Pet. App. C8), but "did not rise to the level of a violation of Section 8(b)(3) * * * [because] there is no evidence that * * * [they] would have disrupted the ongoing bargaining relationship in the New York unit" (*id.*). In a footnote, the Board majority stated: "We do not deem it necessary to reach the question of whether or not the [ALJ] was correct in discounting the arguably representational nature of this demand as being merely an attempt to win employee support in the Vallejo election" (*id.*, n.2). The Company petitioned the United States Court of Appeals for the Second Circuit for review.

On February 15, 1974 the Court of Appeals granted the Company's petition for review, vacated the Board's order and remanded the case to the Board for further proceedings consistent with the Court's opinion.

Argument

1. The Court of Appeals first held that "the Board's finding that the Union's efforts [to enforce the arbitration award] were motivated by a desire to protect the job security of the Long Island employees and not by a desire to represent the Vallejo [California] employees was not supported by substantial evidence" (492 F.2d at 68; Pet. App. A9), and that "[t]he only reasonable conclusion is that the Union was seeking to represent the Vallejo [California] employees through * * * the grievance procedures in New York" (492 F.2d at 68; Pet. App. A10). That holding destroys the factual basis for the Union's argument to this Court (Petition, 7-8) that its actions to apply the terms of

a New York contract to California employees whom it did not represent were legitimatized by its interest in protecting the job security of the New York employees it did represent. For the Union's entire attack on the Court of Appeals' decision assumes that its motives were, in fact, solely to protect the New York employees, and not to represent the California employees. The Union does not claim that the Court of Appeals was wrong if the Union's motives were in fact what the Court found them to be.

While the Union does note in passing its disagreement with the Court of Appeals' findings on this critical question of fact (Petition, 9), the Union does not now suggest that this Court should grant certiorari to review the Court of Appeals' finding on the facts. And, as this Court made clear in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), it will only rarely grant certiorari to review a Court of Appeals' determination, like this one, that Board findings are not supported by evidence: "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied" (340 U.S. at 491). The Union does not claim that this case presents that "rare instance".

Since all of the Union's stated reasons for seeking certiorari depend upon vacating the Court of Appeals' conclusion on the facts, it follows that the petition for certiorari should be denied.

2. The petition for certiorari should be denied even if the Court of Appeals erred in its findings as to the Union's motivations, for the Court of Appeals further held that "regardless of the Union's motive in seeking enforce-

ment of the arbitration award" (492 F.2d at 69; Pet. App. A11), the Union violated Section 8(b)(3), because "there is no evidence that the terms of employment at the Vallejo unit affected the New York City unit" (492 F.2d at 70; Pet. App. A14) and, therefore, "the subject of the wages and working conditions of the Vallejo employees was not a permissible subject of bargaining in the New York City unit" (492 F.2d at 69; Pet. App. A11).

The Union first attacks the Court's holding that California wages were not a "permissible" subject of bargaining (Petition, 7-8, 9, 11) as contrary to the principle enunciated in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959) ("*Oliver I*"); and *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967). Those three decisions held, or assumed (*National Woodwork*, 386 U.S. at 643), that certain subject matters, in the particular circumstances presented in those cases, constituted *mandatory* subjects of bargaining. Those subjects were: (1) "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" in *Fibreboard* (379 U.S. at 215); (2) the minimum rental to be paid by an employer motor carrier who leased vehicles to be driven by their owners rather than by the carrier's employees in *Oliver I;* and (3) a work rule that "No * * * [carpenter] will handle * * * any doors * * * which have been fitted prior to being furnished on the job" in *National Woodwork* (386 U.S. at 615). But the Union concedes here that those three decisions—as to what are *mandatory* subjects of bargaining—are inapplicable

here, since it says in its Petition: "[t]he Union acknowledges that the work preservation clause it succeeded in negotiating [which the arbitration award purported to enforce to the extent lawful under the Act] is only a *permissive* subject of bargaining" (Petition, 9).

Moreover, unlike this case, none of the three cited cases involved bargaining with a union over the wages, hours and other substantive terms of employment of employees not represented by that union and within a different appropriate bargaining unit.*

The Union further asserts that in determining that the wages and working conditions of the California unit were not a *permissible subject* of bargaining in the New York unit, the Court of Appeals misapprehended this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) in that, the Union asserts, *Pittsburgh* involved "determination of the existence of a *mandatory* subject of bargaining and has no application to a *permissive subject* lawfully incorporated as a term of the collective agreement" (emphasis in original) (Petition, 9). The Court of Appeals had no such misapprehension. It simply believed that the standard set by this Court in *Pittsburgh* for determining when the terms of em-

* *Oliver I* involved the fixing by an employer and union of terms of hire of persons whose status as employees or independent contractors the Court did not determine (*see* 358 U.S. at 297-298, dissenting opinion of Whittaker, J.). Assuming those persons to be employees, *Oliver I* is easily distinguishable on the ground that there the particular terms represented "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining agreement" (358 U.S. at 294), whereas here, as the Court of Appeals found, "there is no evidence that the terms of employment at the Vallejo unit affected the New York City unit" (492 F.2d at 70; Pet. App. 14).

ployment of employees outside the unit is a *mandatory* subject of bargaining—"whether [the third-party concern] vitally affects the 'terms and conditions' of [bargaining unit employees'] employment" (404 U.S. at 179)—should also be applied to determine whether such a matter was within the scope of *permissible* bargaining (492 F.2d at 70; Pet. App. A13).* Applying that standard, the Court of Appeals found that "there is no evidence that the terms of employment at the Vallejo unit affected the New York City unit" (492 F.2d at 70; Pet. App. A14), and accordingly held that Vallejo terms of employment were not *permissible* subjects of bargaining in the New York unit.

3. The Union contends, finally, that "Section 8(b)(3) of the Act cannot be fairly construed to preclude the union from proceeding by arbitration to enforce Article I of its agreement" (Petition, 10),** relying on this Court's state-

* In *Pittsburgh*, we note, this Court said that "This is not to say that application of *Oliver* and *Fibreboard* turns only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct his business, may be equally important" (404 U.S. at 180, n. 19). In this case, the Court of Appeals placed its determination as to bargainability on such an "other" consideration: "the Company could not have complied with the arbitrator's award without infringing upon the rights of the Vallejo employees in violation of §§8(a)(1) and (a)(2) of the Act" (492 F.2d at 70; Pet. App. A11). The Union does not attack this finding in its Petition.

** The Union similarly contends that "Here there is not a scintilla of evidence that the Union did anything more than engage in the peaceful pursuit of its contract rights under the procedures prescribed in the collective agreement" (Petition, 11). That "peaceful pursuit of its contract rights" was aimed at achieving a second arbitration award holding that the Company had not complied with the first award and directing application of the substantive terms of the New York contract to the California employees. Such a second award might have freed the Union from its contractual no-strike commitment, which was not to strike during the term of the agreement "unless the Employer refuses or fails to conform to an award of an arbitrator rendered in accordance with the provisions of this Agreement" (E81). Thus the Union's "peaceful pursuit of its contract rights", if successful, would have resulted in freeing the Union to strike during its contract term.

ment in *Pittsburgh* that "The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract" (404 U.S. at 188). But this case involves no such "permissive term"; the Court of Appeals held that Vallejo terms of employment were not permissible subjects of bargaining in the New York unit. *Pittsburgh* establishes no such right as asserted by the Union (Petition, 10) to proceed by arbitration to enforce impermissible contract terms. Nor are the Union-cited authorities (Petition, 10) construing the word "coercion" in Sections 8(b)(4) and (3) and Section 8(a)(1) of the Act of any relevance. This Union was charged with refusal to bargain, not coercion. Section 8(b)(3) of the Act does not except "peaceful" union refusals to bargain, nor those which can be cast as efforts to enforce alleged contract rights, whether by arbitration or otherwise, as to employees the union does not represent.

Conclusion

For all of the foregoing reasons the petition for certiorari ought to be denied.

Respectfully submitted,

HERBERT PRASHKER
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
Attorneys for
Sperry Management Division,
Sperry Rand Corporation, Respondent
777 Third Avenue
New York, New York 10017

Dated: New York, N. Y.
June 15, 1974